NO. 82-1153

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR CLUB OF AMERICA INSURANCE COMPANY,
A Corporation of the State of New Jersey,

Appellant,

vs.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF INSURANCE and JAMES J. SHEERAN, NEW JERSEY COMMISSIONER OF INSURANCE,

Appellees.

On Appeal from the Supreme Court of New Jersey

REPLY BRIEF OF APPELLANT IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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Preliminary Statement

This brief is submitted on behalf of Appellant, Motor Club of America Insurance Company,* in opposition to

* Pursuant to Supreme Court Rule 28.1, we respectfully invite the Court's attention to the footnote on page i of Appellant's Jurisdictional Statement for a listing of the names of Appellant's parent company, subsidiaries (except wholly-owned subsidiaries) and affiliates.

Appellees' motion to dismiss this appeal or to affirm the final judgment of the Supreme Court of the State of New Jersey, entered on October 14, 1982 (A.21a).* This brief supplements the Jurisdictional Statement previously filed on behalf of Appellant, and upon which we principally rely in opposition to Appellees' present motions and in support of Appellant's request that the Court grant plenary consideration of the issues raised by this appeal.

ARGUMENT

POINT I

Appellees' position in support of their motion to dismiss or affirm is predicated upon presumed facts which Appellant will disprove if afforded the opportunity to try its case.

The argument Appellees have made in support of their Motion to Dismiss or Affirm is woven from a number of separate threads. The principal elements of that argument are based on a series of factual contentions that (a) "Appellant accepted, without challenge to their adequacy, rate increase after rate increase, while failing to utter one word in protest" (M.D.8); (b) Appellant failed "to make use of any of several administrative and judicial remedies available" (M.D.8); and (c) "Appellant has never attempted to cease operations voluntarily" (M.D.9).

Appellant states that Appellees' contentions are unproven and inaccurate. If given the opportunity to try its

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* As used herein, "A" refers to the appendix to the Jurisdictional Statement; "J.S." refers to the Jurisdictional Statement; "Ra" refers to the appendix to the Motion to Dismiss or Affirm; and "M.D." refers to the Motion to Dismiss or Affirm.

case, Appellant will establish that it frequently protested to the insurance department about the injury it was sustaining; that it did seek various forms of administrative and judicial relief; and that it attempted to cease writing policies, to wind down its business, and to dispose of its assets in a manner protective of the interests of its creditors, policyholders, and shareholders.* Neither this Court nor any of the New Jersey courts is, or has been, in a position to resolve these disputes, for none of the factual contentions has been the subject of discovery, proof, or cross-examination. To the extent that the contentions have pertinence, Appellant only asks that they be decided on the record after trial rather than by pre-judgment before trial.

Additionally, Appellees' argument contains the legal contentions that the within action constitutes an impermissible collateral attack on rate making proceedings** and that it

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* N.J.S.A. 17:30C-1 precluded Appellant from filing any proceeding to liquidate or from pursuing any other similar procedure, but Appellant did resist turning over its assets to the Commissioner whose policies had eroded their value.

** Appellant does not dispute the validity of Appellees' statement (M.D.9) that ". . . the failure of past rates to deliver a projected return may not be corrected through future rate decisions." Appellant does, however, dispute the conclusion drawn by Appellees from this statement that ". . . it logically follows that the past losses may not be recovered from the public regulator, where . . . the regulated entity failed to invoke any of the statutory or judicial remedies available . . ." (M.D.9). There is no logic involved. The concern to protect future rate payers from the burden of making up underpayments by prior users is not implicated in requiring the public generally to pay for takings of private property. Moreover, such losses, which Appellant here complains of, cannot be considered a "risk of the business" with-

(Footnote continued on following page)

is unnecessary to consider whether N.J.S.A. 17:30C-1 through C-31 destroyed Appellants' withdrawal rights."* These arguments were anticipated in the Jurisdictional Statement (J.S.5 to 10, 20n*, 24-28); and in general, we rely upon what was stated there in opposition to them. However, it is important to emphasize the critical differences between the parties concerning the availability of judicial review of rate making determinations.

Appellees rely heavily upon the availability of the right to judicially review administrative rate determinations, stating (M.D.11) that:

> At least ten separate rate increases were granted to ISO members (including appellant) by the Commissioner during the period of time encompassed by the complaint, and not one was subject to a legal challenge by ISO or by appellant as inadequate, improperly negotiated or in any way inconsistent with the standards of the Rating Law, N.J.S.A. 17:29A-1 *et seq.*

(Footnote continued from preceding page)

in the meaning of *Georgia Railway & Power Co.* v. *Railroad Comm.*, 278 F. 242, 247 (D.Ga. 1922), *aff'd* 262 U.S. 625 (1923), as argued by Appellees (M.D.9), since as we are prepared to show, the New Jersey system is not a fair one and the so-called "statutory or judicial remedies" referred to above in Appellees' argument were not available to Appellant. *See* text, this Point I.

* At M.D.9, Appellees assert that the Courts of New Jersey did not pass upon the validity of this statute. In fact, the trial judge agreed that it precluded voluntary withdrawal from business and granted Appellee, Commissioner, the sole power to decide whether and on what terms a domestic insurance carrier could be liquidated (A.6a, 7a, 17a). The Appellate Division stated that it was unnecessary for it to reach the question in view of its other determinations (A.3a). *See* J.S.11 to 14.

Appellant takes note of the quoted facts and asks "why?" Is it not surprising, to say the least, that none of the fifteen largest carriers in the State, who in the aggregate lost over $625 million between 1975 and 1979 (A.67a), raised any legal challenge? The answer to the inquiry and the explanation for the surprising result is quite simply that the rate system was coercively structured and administered as indicated in the Jurisdictional Statement (J.S.8 to 10; 25, 26). At bottom, the parties disagree over whether the statutory remedy of judicial review was in fact rendered illusory; and Appellant should be given the opportunity to prove its contention that the Commissioner's grant of some rate relief was typically conditioned upon the rating organization's withdrawal of its original application for greater relief and the filing of an amended application for the lesser relief, thus precluding appeals with respect to the disputed amount of the original requests (J.S.10). *See* the Order of the Appellate Division in *Automobile Insurance Plan Service Office* v. *James J. Sheeran*, No. 2-1024-77, April 25, 1978 (A.63a), which illustrates this coercive practice and its impact on appellate rights.

More is involved than the illusory nature of the industry's right to judicial review.* If the industry's remedies were illusory, Appellant's were doubly so once the rating organization had concluded to accept the rate the Commissioner was prepared to grant. The trial court effectively explained why this was so in fn. 8 of its Opinion (A.13a):

> The probability of relief must be real. An example of illusory relief is found in the State's argu-

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* The issues involved here are different from those involved in rate making and could not even be raised in a rate making proceeding or in an appeal therefrom (see J.S.24-27).

ment that if MCAIC finds the industry-wide rate noncompensatory it could file on its own for a rate. It could, in the sense that nothing in the statute prevents the attempt. The State concedes, however, that a single company would be unable to present the statistical evidence necessary to command a rate decision. Yet another example of illusory relief is the possibility of an approved deviation from industry rates *viz.* special dispensation for a particular company based on its special difficulties (MCAIC has requested and the Commissioner granted a 7% upward deviation from ISO rates on three categories of insureds.) A deviation, however, places the company at a competitive disadvantage, thereby exacerbating its problems rather than solving them.

Under such circumstances, Appellees' argument that Appellant's claim is barred because of its failure to seek judicial review of prior rate making decisions is unpersuasive.

In conclusion, we submit that the thrust of Appellees' argument is to try to foreclose the proofs which will establish Appellant's claims. Appellant, on the other hand, seeks only the opportunity to make those proofs. Accordingly, we respectfully urge the Court to deny Appellees' motion and to set the case down for plenary consideration.

POINT II

The enactment of P.L. 1983, c.65 (February 10, 1983) (Ra4a through 46a) and Appellant's 1982 operating results, set forth in its 1982 Annual Report filed with Appellee, Department of Insurance, do not bear upon the issue of whether Appellees have effected a taking of Appellant's property for which just compensation must be paid.

Appellant commenced this action in October, 1980, seeking just compensation for the taking, by Appellees, of its property during the period commencing in 1975 and continuing through the filing of the Complaint. Appellees now argue in support of their Motion to Dismiss or Affirm that New Jersey's passage in 1983 of P.L. 1983, c.65 and Appellant's operating results in 1982 undercut the validity of Appellant's compensation claims (M.D.5, 6, 13, 14). The issue of whether a compensable taking of Appellant's property occurred during the period 1975 through the end of 1980 must be determined by reference to the statutory and regulatory scheme then in effect and to the method by which that scheme was administred during that period. While the subsequent reform of a harsh regulatory system—and we do not concede that the enactment of P.L. 1983, c.65 or Appellant's 1982 operating results indicate that the New Jersey insurance regulatory system has been reformed (*see, infra*)—may mark the end of a period of taking, we respectfully submit that any such reform, by itself, is not an adequate remedy for the party whose property has already been taken because it does not negate the fact of said taking or the constitutional requirement that just compensation be paid on account of it. *See* our discussion of *San Diego Gas & Electric Co.* v. *San Diego,* 450 U.S. 621 (1981) in the

Jurisdictional Statement (J.S.19, 20). For these reasons neither the enactment of P.L. 1983, c.65 nor Appellant's 1982 operating results can, as a matter of law, provide a basis to support Appellees' present Motion to Dismiss or Affirm.

The enactment of P.L. 1983, c.65 in effect constitutes a legislative recognition of the gross inequities and inadequacies of the system during the years in question in this law suit, and, as such, it underscores the validity of Appellant's claims for just compensation for the taking of its property in those years.* Further, Appellant's operating results, incorporated in its 1982 Annual Statement filed with Appellee, Department of Insurance, while not directly relevant to the issues raised in Appellant's Complaint, do emphasize the validity of Appellant's claims rather than detract from them as suggested by Appellees. Appellees have lightly glossed over the components of the

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* Whether the new law will actually result in a beneficial reform, *in futuro*, of the regulatory system cannot be determined at this time as the law has not yet become operative. While the Appellees have asserted that the law addresses all the "perceived statutory inadequacies" of the present system (M.D.13), there are strong indications that further reform will be necessary, *e.g.*— reducing the medical portion of the personal injury protection feature of New Jersey automobile insurance policies and the possible elimination of mandatory liability coverage, before the system is fully equitable. One new bill, Assembly 3226, addressed to problems with P.L. 1983, c.65 has already passed the Assembly, and proposals for additional legislation have been made by a number of parties including Appellee, Insurance Department. Because the effect of the new statute; the future of pending legislation; and the need for possible further change are, at best, speculative, the enactment of P.L. 1983, c.65 cannot be shown to provide a framework for reform and does not form a basis to grant Appellees' present motion.

gross increase of $7,667,923 in Appellant's surplus as regards policyholders during 1982 and have strongly asserted that "these gains were produced under the statutory and regulatory mechanism complained of by appellant." (M.D.6).

While not presently in the record, Appellant is prepared to prove that more than 90% of that increased surplus was due to income realized on a June 30, 1982 sale by Appellant of its wholly-owned subsidiary, Garden State Life Insurance Company, to GEICO* and to other investment income and miscellaneous adjustments. Moreover, Appellant can show that the small underwriting gain of $601,587 (M.D.6) was due to a continuing moratorium, belatedly granted by Appellee, Commissioner, with respect to Appellant's acceptance of new assigned risk policies from the Automobile Insurance Plan, which moratorium has been in effect since January 1, 1980.** But for the moratorium, Appellant would have suffered significant underwriting losses in 1982 and would suffer further losses in 1983. In fact, by letter dated March 8, 1983, a few days prior to Appellees' present motion, the Commissioner of Insurance advised the Automobile Insurance

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* The Verified Complaint contemplated that Appellant's surplus could be improved by the sale of its subsidiary for more than its book value (¶27(a) of Verified Complaint, A.39a). *See* also Affidavit of David Green, ¶16 (A.58a, 59a).

** As a result of that moratorium, Appellant can show that its earned premiums from its Automobile Insurance Plan business dropped from a high of $14,820,120 in 1979 to $1,661,056. As the loss ratio experienced by Appellant on this business is approximately 140%, *i.e.*—for every dollar of premium earned, one dollar and forty cents is paid out in losses and expenses (A.30a, ¶10), the substantial decline in earned premium as the result of the moratorium has been of significant benefit to Appellant.

Plan that the moratorium against Appellant's receiving assignments is to remain in effect, stating:

> . . . I find that the financial condition of the above company is such that it would create an undue financial burden upon the company if it were required to receive assignments based upon its voluntary automobile liability insurance premiums written in 1981 at the present time.
>
> I therefore direct that subject to subsequent financial developments, no assignments shall be given to MCA during 1983 based upon its voluntary automobile writings in 1981.*

We respectfully submit that neither Appellant's 1982 results set forth in its Annual Statement nor the passage of P.L. 1983, c.65, provides any basis to justify a grant of Appellees' Motion to Dismiss or Affirm.

CONCLUSION

For the reasons set forth in the Jurisdictional Statement and this brief, we respectfully submit that Appellees' Motion to Dismiss or Affirm should be denied, and we urge the Court to grant plenary consideration of the issues raised by this appeal.

Respectfully submitted,

STANLEY WEISS, *Counsel for Appellant*
ROBERT E. TURTZ

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Attorneys for Appellant, Motor Club of America Insurance Company.

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* A copy of the entire March 8, 1983 letter from Commissioner Murphy to the automobile Insurance Plan is annexed hereto for the information of the Court.

APPENDIX

Letter dated March 8, 1983 from State Commissioner to Plan Manager

STATE OF NEW JERSEY
Department of Insurance
Joseph F. Murphy, Commissioner
CN 325
Trenton, N. J. 08625
609-292-5360

March 8, 1983

Mr. John R. Murphy
Plan Manager
New Jersey Automobile Insurance Plan
733 Third Avenue
New York, NY 10017

RE: Motor Club of America Insurance Company
Suspension of Assignments
Rule 6 (D)
Your File No. 16012.020

Dear Mr. Murphy:

Pursuant to the provisions of Section 6 (c) (10), I find that the financial condition of the above company is such that it would create an undue financial burden upon the company if it were required to receive assignments based upon its voluntary automobile liability insurance premiums written in 1981 at the present time.

I therefore direct that subject to subsequent financial developments, no assignments shall be given to MCA dur-

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ing 1983 based upon its voluntary anutomobile liability premium writings in 1981.

In making the above determination, I have considered the voluntary undertaking upon the part of MCA to pay to the Plan an amount equal to 85% of the policy constant payments made to MCA by its policyholders in connection with policies effective on January 1, 1983 and thereafter and renewals of policies previously in effect, which renewals become effective on January 1, 1983 and thereafter.

Calculation of payments required to be made to the Plan shall be on the basis of earned premiums as calculated on policies or renewals of policies in effect as shown by the books of MCA. Documentation shall be provided by MCA in form and substance reasonably satisfactory to the Plan to enable the Plan to verify computation of payments.

The above payments will be made quarterly, 45 days after each quarter. Such payments will be applied in reduction of the assessment obligations of the other member companies.

Please take further note that the Department of Insurance reserves the right to modify or discontinue the above arrangement on a prospective basis, if the financial condition of the company or the failure of the company to make the payments set forth above, shall warrant such action.

Very truly yours,

JOSEPH F. MURPHY
Commissioner

cc: Stephen A. Gilbert (MCA)
Warren P. Cooper